(2)

Supreme Court, U.S.
FILED
NOV 24 1997
CLERK

No. 97-710

In The

Supreme Court of the United States

October Term, 1997

PAULA KILCOYNE,

Petitioner,

vs.

BENTLEY COLLEGE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID C. HENDERSON
Counsel of Record
SHARON R. BURGER
NUTTER, McCLENNEN & FISH, LLP
Attorneys for Respondents
One International Place
Boston, Massachusetts 02110
(617) 439-2000

72512 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

2388

QUESTIONS PRESENTED

1. Whether the First Circuit Court of Appeals ("the First Circuit"), merely by affirming *per curiam* a grant of summary judgment by the District Court, decided an important federal question in a way that conflicts with relevant decisions of this Court.

2. Whether the First Circuit's *per curiam* affirmation of a grant of summary judgment by the District Court conflicts with a decision of the Third Circuit Court of Appeals ("the Third Circuit") on an important matter.

3. Whether this Court's exercise of supervisory power is required merely because the First Circuit ordered double costs charged against petitioner Paula Kilcoyne's counsel because he unreasonably and vexatiously multiplied the proceedings in this case.

PARTIES TO THE PROCEEDING

The petitioner is Paula Kilcoyne ("Kilcoyne").

The respondents are: Bentley College ("Bentley"); Earl L. Avery ("Avery"), Bentley's Assistant for Equal Employment Opportunity; Philip Friedman ("Friedman"), Bentley's Vice President for Academic Affairs and Provost; H. Lee Schlorff ("Schlorff"), Bentley's Dean of Faculty; and Stewart P. Shapiro ("Shapiro"), the late Bentley Professor of Government and Department Chair.[1]

Bentley is a nonprofit organization with no parent companies and no nonwholly owned subsidiaries.

---

1. Shapiro died in January 1994, approximately three months after the initiation of this litigation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Statement of the Case	1
A. Introduction	1
B. Statement of Facts	2
C. Proceedings Below	6
D. Correction of Misstatements in the Petition	7
Reasons for Denying the Writ	10
I. There Is No First Circuit Conflict With This Court.	11
II. There Is No First Circuit Conflict With The Third Circuit.	13
III. This Court's Exercise Of Supervisory Power Otherwise Is Not Required.	17
Conclusion	18

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Marzano v. Computer Science Corp., Inc., 91 F.3d 497 (3rd Cir. 1996) 14, 15, 16

McCoy v. Massachusetts Institute of Technology, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992) 12, 14

Taxman v. Board of Education of Township of Piscataway, 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997) 16, 17

Statute Cited:

42 U.S.C. § 1981 6

Rules Cited:

Fed. R. App. P. 28(a)(4) 12

Fed. R. App. P. 39(a) 18

Supreme Court Rule 15.2 7

STATEMENT OF THE CASE

A. Introduction

Kilcoyne, *a woman*, bizarrely sued the respondents for *sex* discrimination after Bentley chose *another woman* for a college teaching position.[2] When presented with the respondents' motion for summary judgment, the District Court, using *exactly the prima facie criteria urged upon the District Court by Kilcoyne*, found that Kilcoyne had not established a prima facie claim of sex discrimination and awarded summary judgment, because there was absolutely no evidence that sex played any role whatsoever in any aspect of the selection process. Kilcoyne then appealed the award of summary judgment to the First Circuit on the increasingly bizarre theory that the District Court somehow had erred by adopting exactly the prima facie criteria that Kilcoyne had advocated. Further, Kilcoyne also invoked on appeal an utterly baseless theory about which she had never before even hinted — *i.e.*, that *sex* discrimination somehow had been proven because of evidence that the college selection committee believed that the *other woman's* Hispanic *ethnicity* would "complement" the college student body. In response, the First Circuit not only affirmed the District Court award but also imposed sanctions on Kilcoyne's counsel for unreasonably and vexatiously multiplying the proceedings. Now, completely undeterred by these sanctions, Kilcoyne brings her frivolity to this Court and petitions for Certiorari on the meritless notions that: (1) this Court's precedents actually required the District Court to award summary judgment to her on sex discrimination

---

2. Six women and 38 men applied for the position. The selection committee, which consisted of two men and one woman, dismissed from further consideration all 38 male candidates and four of the six female candidates. Two women, Kilcoyne and Maria de los Angeles Guido ("Guido"), were the only finalists. Ultimately, Bentley hired Guido, not Kilcoyne.

claims notwithstanding the absence of any evidence whatsoever that sex was a factor in the hiring decision; (2) the District Court's application of the Kilcoyne-advocated prima facie criteria for sex discrimination claims somehow conflicts with unrelated decisions in the Third Circuit; and (3) the sanctions imposed by the First Circuit because of unreasonable and vexatious multiplication of proceedings were improper.[3] The Petition necessarily should be denied. Entirely absent is any justification for an exercise of this Court's discretionary jurisdiction.

B. Statement of Facts

Bentley employed Kilcoyne first as a part-time instructor in the Government Department from 1986-1989, and then in a non-tenure track position as an Assistant Professor in the Government Department for the spring semester of 1989. *See* Kilcoyne's Appendix to the Appellate Brief she submitted to the First Circuit ("First Circuit App.") at 82. Bentley thereafter renewed Kilcoyne's appointment in this latter, non-tenure track position for successive one-year terms, ending with the 1991-1992 term. First Circuit App. at 82. Kilcoyne's final period of employment with Bentley expired by its own contractual terms on June 30, 1992; she had no right to continue employment at Bentley beyond that date. First Circuit App. at 83, 87-88.[4]

---

3. As is discussed below, at issue are sanctions of a truly *de minimis* amount — a grand total of $76.50.

4. The contract Kilcoyne signed on May 15, 1991, stated as follows:

> This is a non-tenure track appointment signifying that the recipient thereof cannot expect automatic renewal of the full-time contract and accepts this fact as a precondition of employment. This temporary employment will expire on 6/30/92 unless renewed at the discretion of [Bentley] and no further notice of termination will be given.

First Circuit App. at 88.

In the Fall of 1991, because of the announced retirement of a tenured Government Department member, Bentley decided to attempt to fill a potential tenure track position in that Department. First Circuit App. at 82, 92. Shapiro, the Chair of the Government Department, commenced the search by publishing a job announcement that stated that Bentley was seeking applicants with an expertise in Comparative International Politics, and preferably a "Concentration in Latin America." First Circuit App. at 92, 96. Many candidates applied for the position, including Kilcoyne. First Circuit App. at 92.[5] The three senior members of the Government Department, one of whom is a woman,[6] selected *two women*, Kilcoyne and Guido, as the only finalists. First Circuit App. at 92. *None of the male candidates were selected as finalists*. First Circuit App. at 92.[7]

During the selection process, Schlorff, the Dean of Faculty, met privately with Kilcoyne for approximately forty-five

---

5. Kilcoyne's purported "expert," David A. Burn ("Burn"), reported that he reviewed the files of 44 applicants for the position. First Circuit App. at 398. Six of the 44 applicants were women; 38 were men. First Circuit App. at 400, 405.

6. The female member of the selection committee was Professor Christine Williams ("Williams"), whose affidavit is at First Circuit App. at 91-96. Williams subsequently became Chair of the Government Department, thus further undercutting Kilcoyne's theory that the Department discriminates against women. First Circuit App. at 91.

7. The irony of Kilcoyne's *sex* discrimination claim is even further magnified by the report of her "expert," who opined that, although "Paula Kilcoyne and Maria Guido were the most qualified female applicants for the position," "several male applicants were more qualified than either Paula Kilcoyne or Maria Guido in terms of numbers of years with a Ph.D., number of years in teaching, number of publications, and knowledge of Latin America." First Circuit App. at 398. *See also* First Circuit App. at 401.

minutes. First Circuit App. at 83, 101. In his capacity as Dean, Schlorff was already familiar with Kilcoyne's work. First Circuit App. at 83.

Similarly, the senior members of the Government Department were already familiar with Kilcoyne; she had worked as a full-time faculty member of the department since January 1989 and, before that, as a part-time adjunct faculty member since September 1986. First Circuit App. at 92. Guido, on the other hand, travelled from Texas for her interview, and was less familiar with the Government Department, the Bentley campus, and the local community. First Circuit App. at 92. To familiarize Guido with Bentley, the selection committee introduced her to some of Bentley's staff, administrators, and faculty, and met her at her hotel for dinner in accordance with Bentley's customary practice for out-of-town job candidates. First Circuit App. at 92-93.

The selection committee invited both of the two female finalists to give presentations at Bentley in support of their candidacies. Guido's presentation focused on her research in Latin America and international political economy. First Circuit App. at 94. Kilcoyne's presentation involved the psychological background of Presidents, a topic unrelated to the job position. First Circuit App. at 94.

Subsequently, the three senior members of the Government Department *unanimously* found that Guido was a better candidate than Kilcoyne. First Circuit App. at 92-95. They reasoned that Guido's experience was in Latin American Politics and international political economy, that only Guido had experience teaching courses specifically focused in these areas, and that Guido's background and expertise in international political economy would accommodate Bentley's desire to move in an interdisciplinary direction. First Circuit App. at 93. Other

factors were that Guido's scholarly work was in the field of international political economy and Latin American politics, and in her presentation to the Department, Guido discussed her research in these areas. First Circuit App. at 94. In addition, the committee believed that, since Kilcoyne already had been working at Bentley full-time for three years, Kilcoyne would become a tenure candidate at a time when she would be unable to achieve tenure status, because she lacked an existing record of publications. First Circuit App. at 95. Although Guido did not yet have her Ph.D. as of the Spring of 1992, Shapiro checked with Guido's thesis advisor and learned that Guido already had defended her dissertation. First Circuit App. at 94. The selection committee thus understood that Guido's dissertation only needed editorial revisions and binding, and that she then would be awarded her Ph.D. First Circuit App. at 94.[8] Finally, the selection committee believed that, in addition, Guido's Hispanic ethnicity would complement the student body. First Circuit App. at 93.

The three senior Government Department members on the selection committee therefore recommended unanimously that Bentley offer the position to Guido. First Circuit App. at 94. Schlorff, the Dean, with the concurrence of Friedman, the Provost, approved that recommendation. First Circuit App. at 82-83. No one at Bentley ever indicated to Kilcoyne that the reason she did not get the position was because she was a woman. First Circuit App. at 102-103. Schlorff and Friedman are adamant

8. Guido in fact received her Ph.D. in the Fall of 1992, shortly after she began teaching at Bentley. First Circuit App. at 94. It is thus unfair and misleading that the Petition repeatedly refers to Kilcoyne as "*Dr.* Kilcoyne" but diminishes Guido by labeling her only as "*Ms.* Guido". *See generally* Petition (emphasis added). Also notable in this purported *sex* discrimination case, in which Bentley unanimously selected a woman *about* to receive a Ph.D. over a woman who already had a Ph.D., is that even Kilcoyne's "expert" notes that Bentley rejected all 16 male applicants who had Ph.D.'s, along with the 22 male applicants who did not have Ph.D.'s, without even interviewing them. First Circuit App. at 401, 414.

that sex played no role whatsoever in Guido's selection. First Circuit App. at 83, 131.

C. Proceedings Below

On October 6, 1993, Kilcoyne filed her Complaint in the District Court. First Circuit App. at 16. The Complaint sets forth five counts: alleged *sex* discrimination in violation of Title VII (Count I), alleged *sex* discrimination in violation of 42 U.S.C. § 1981 (Count II), alleged *sex* discrimination in violation of the Civil Rights Act of 1991 (Count III), alleged wrongful termination (Count IV), and alleged breach of contract (Count V). First Circuit App. at 22-24. Kilcoyne made no mention in her Complaint of discrimination on the basis of ethnicity or national origin.

On March 22, 1995, the respondents filed Defendants' Motion for Summary Judgment seeking summary judgment on all five counts. First Circuit App. at 8, 49-148. The District Court denied this motion "without prejudice to renewing after the close of discovery." First Circuit App. at 10.

On July 24, 1995, after additional discovery, the respondents filed Defendants' Renewed Motion for Summary Judgment. First Circuit App. at 214-287. On January 25, 1996, the District Court held a hearing on this renewed motion. First Circuit App. at 14, 525-544. On August 2, 1996, the District Court issued its Memorandum and Order on Defendants' Motion for Summary Judgment, allowed the motion with regard to Counts I-III, and dismissed without prejudice the state law claims in Courts IV and V. Petition, Appendix C. The District Court issued its corresponding Order of Judgment and Dismissal on August 5, 1996. Petition, Appendix D.

Kilcoyne filed a notice of appeal with the First Circuit on

September 4, 1996. First Circuit App. at 15. In her appellate brief, Kilcoyne argued *for the very first time* her theory that "[b]y providing direct evidence that the defendants placed substantial reliance on a factor, *national origin*, whose consideration is forbidden by Title VII, Dr. Kilcoyne eliminated the necessity for the Court to apply the prima facie case" to her claim of *sex* discrimination. *See* Appellate Brief submitted by Kilcoyne to the First Circuit at 18 (emphasis added). In response, the First Circuit, in a May 22, 1997, *per curiam* opinion, affirmed the District Court's award of summary judgment to the respondents and ordered double costs assessed against Kilcoyne's counsel for unreasonably and vexatiously multiplying the proceedings. Petition, Appendix B.[9] Further, on July 24, 1997, the First Circuit denied Kilcoyne's petition for rehearing. Petition, Appendix A.

Kilcoyne filed her Petition for a Writ of Certiorari on October 22, 1997. The Petition was placed on this Court's docket on October 24, 1997.

D. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.2, the respondents bring to the Court's attention the following misstatements of fact and law in the Petition.

The Petition falsely states that "[i]n November 1991, the Government Department published advertisements seeking applicants *for the job Dr. Kilcoyne held*, but as a potential tenure-track position." Petition at 4 (emphasis added). As is explained above, Kilcoyne *never* held the position that Bentley advertised. Instead, two separate jobs were involved. Kilcoyne's job, a non-

---

9. Undeterred, the same counsel represents Kilcoyne in conjunction with the instant Petition.

tenure track position as an Assistant Professor in the Government Department, expired by its own contractual terms on June 30, 1992, as is stated in the Complaint, ¶ 57. First Circuit App. at 22, 83, 87-88. The other position, the one for which Kilcoyne and Guido competed, was a potential tenure track position that Bentley College advertised in the Fall of 1991 because of the announced retirement of a tenured Government Department member. First Circuit App. at 82, 92.

The Petition falsely states that "[a]t the time of the hiring decision, Dr. Kilcoyne possessed the advertised requirements for the position while Ms. Guido did not." Petition at 5. Notwithstanding Kilcoyne's assertion, Guido satisfied Bentley's job criteria. Indeed, Kilcoyne's "expert" opined that "Paula Kilcoyne and Maria Guido were the most qualified female applicants for the position." First Circuit App. at 398, 401. Thus, as the District Court concluded, "Kilcoyne . . . failed to provide any admissible evidence that Guido was unqualified for the position. . . ." *See* Petition, Appendix C at 5a.

The Petition falsely states that "Dr. Kilcoyne had an earned doctoral degree, an advertised absolute requirement for the position, while Ms. Guido did not." Petition at 5. This is another gratuitous attempt by Kilcoyne to smear Guido with the label of "unqualified," a label that the District Court explicitly rejected. As is noted above, Bentley determined in advance that the award of Guido's Ph.D was imminent, and Guido, in fact, received the Ph.D. in the fall of 1992, shortly after Bentley hired her. First Circuit App. at 94.

The Petition falsely states that "Ms. Guido's record was objectively inferior to that of Dr. Kilcoyne in the areas of teaching and research," and that Guido "had no record of scholarly activity at the time of the hiring decision." Petition at 5, 18. Kilcoyne adduced no evidence to support such malign

contentions. As the District Court found, Guido had 2 1/2 years teaching experience, including experience teaching American National Government, had expertise in Latin American politics and international political economy, and had presented conference papers. Petition, Appendix C at 7a. Further, Kilcoyne's own "expert" credited Guido with publishing three journal articles and eight book reviews. First Circuit App. at 272, 274.

The Petition makes a misstatement through omission of pertinent facts when it asserts that "Bentley College employed different processes to evaluate Dr. Kilcoyne and Ms. Guido." Petition at 5. The only differences in treatment related to Guido having been an out-of-town job candidate. First Circuit App. at 92-93. As is discussed above, Guido traveled from Texas for her interview, and was less familiar with the Government Department, the Bentley campus, and the local community. First Circuit App. at 90-93. Kilcoyne, by contrast, had been a full-time faculty member at Bentley College since January 1989. First Circuit App. at 92. Notably, Kilcoyne never alleged that she did not know well all three members of the Bentley selection committee and others holding positions in campus administration. It is thus patently absurd, perhaps even deceitful, for Kilcoyne now to complain that "[she] was not introduced to these people." *See* Petition at 5.

The Petition falsely states that "[t]he mendacity of Chairman Shapiro influenced some members of the Department to favor Ms. Guido." Petition at 5. There is no evidence whatsoever that Shapiro was "mendacious" in anything that he did.

The Petition falsely states that "[a]fter litigation commenced, the defendants cited Maria Guido's Costa Rican ethnic origin as a factor which substantially influenced their decision to hire her and to reject Dr. Kilcoyne." Petition at 6.

Instead, the three senior members of the Government Department unanimously found that Guido was a better candidate than Kilcoyne for the *multitude* of reasons set forth above. The *only* thought of any type given to Guido's Hispanic ethnicity was that it would "complement" the student body. Notably, there is no evidence in this case about Kilcoyne's ethnicity, no evidence about the ethnic composition of the student body, and no evidence about how Kilcoyne's ethnicity might also "complement" the student body — after all, Kilcoyne based her discrimination claims solely on sex, and the parties therefore never litigated such issues of ethnicity in the District Court.

The Petition falsely states that the District Court "found" that "Guido's Hispanic ethnicity appeared to play a significant role in the hiring decision." Petition at 8. It is beyond question that the District Court never made any such finding of fact. Instead, the District Court, bending over backward to interpret the evidence in the light most favorable to a plaintiff facing an adverse summary judgment motion, merely used a comment about the *un*claimed and *un*litigated issue of ethnicity to illustrate the complete absence of any evidence related to the *sex* discrimination claim that Kilcoyne was trying (without any evidence) to prosecute. There was thus no basis for a "finding" regarding ethnicity, much less any actual "finding."

REASONS FOR DENYING THE WRIT

The Supreme Court should decline Certiorari in this case because the First Circuit did *not* decide an important federal question in a way that conflicts with a decision of this Court or of the Third Circuit, and this Court's exercise of supervisory power otherwise is not required.

I.

THERE IS NO FIRST CIRCUIT CONFLICT WITH THIS COURT.

Kilcoyne argues that the First Circuit's *per curiam* affirmation of the award of summary judgment to the respondents conflicts with decisions of this Court because "findings [by the District Court related to *ethnicity*] eliminated the necessity for any court to apply the prima facie case" in her *sex* discrimination case. Petition at 8. Her contention is without merit. First, as is emphasized above, there was no such "finding." The District Court merely commented on ethnicity to illustrate the utter absence of evidence relating to Kilcoyne's sex discrimination claims, not to make a separate "finding."

Second, even more inane is Kilcoyne's implicit assertion that a claim for *sex* discrimination somehow is proven when her counsel, for the very first time on appeal, argues that an award of summary judgment to the respondents should be overturned because the respondents actually discriminated against her on the basis of *ethnicity*. Kilcoyne does not and cannot contend that she ever argued this theory of her case at any time prior to her appeal of the District Court's ruling. Nor can she cite valid case law from this or any other court to support an argument so bizarre and untimely.

Kilcoyne thus displays sheer desperation when she asserts disingenuously that "Respondents did not argue the existence of a bona fide program of affirmative action nor that they had validated some relationship between Hispanic ethnicity and the ability to teach subjects with Latin American content." Petition at 11. Because Bentley and the other respondents *never had any need to make such arguments*, they of course did not. After all, Kilcoyne proceeded in the District Court *only* on the basis

of alleged *sex* discrimination, and it was only on her appeal to the First Circuit Court of Appeals that she first invoked ethnicity and national origin in any context. The pertinent First Circuit case law on this point is supremely unexceptional: "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 22-23 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

Further, Kilcoyne, quite obviously, has no absolute insight into, and can only speculate about, the multitude of reasons on which the First Circuit relied when it issued its *per curiam* opinion affirming the District Court's award of summary judgment to the respondents.[10] Mere speculation about the First Circuit's motivation cannot possibly provide an adequate basis for an exercise of this Court's discretionary jurisdiction. Nor is there precedent in this Court or anywhere else holding that an award of summary judgment to defendants on claims of sex discrimination should be overturned when a plaintiff, for the very first time on appeal, raises issues relating to ethnicity. That Kilcoyne once again asserts such baseless arguments so vehemently in her Petition to this Court illustrates exactly the frivolity for which the First Circuit already imposed sanctions.

---

10. There is no question that the First Circuit had a multitude of possible reasons. As the respondents then argued, Kilcoyne's appellate brief was lacking in compliance with Fed. R. App. P. 28(a)(4) in that the brief's purported "statement of facts" was not based on, and did not have appropriate references to, the record; Kilcoyne could not show the existence of any genuine dispute of material fact; Kilcoyne attempted to argue on appeal issues never presented to the District Court; and Kilcoyne misstated to the First Circuit the evidence in the record and the applicable law. *See generally* First Circuit Brief for Defendants-Appellees.

II.

THERE IS NO FIRST CIRCUIT CONFLICT WITH THE THIRD CIRCUIT.

Kilcoyne's arguments relating to an alleged conflict between the circuits are even more tortured. Her Petition asserts that "the First Circuit . . . erred in requiring evidence at the prima facie stage that sex was not treated neutrally in the hiring decision, a requirement which is in direct conflict with decisions of the Third Circuit." Petition at 13. Worth noting at the outset is that the First Circuit stated *absolutely nothing* about the prima face case in its *per curiam* decision, much less anything in conflict with the decision of another court, because it necessarily determined that it did not *need* to delve into detailed written analysis in order to reject Kilcoyne's frivolous appeal. *See* Petition, Appendix B. Even more salient, however, is the inconsistency that Kilcoyne displayed at the First Circuit and continues to display now — after all, in Plaintiff's Opposition to Defendant's Motion For Summary Judgment, *Kilcoyne explicitly argued to the District Court exactly the prima facie criteria that she argued against on appeal.* Kilcoyne argued to the District Court as follows:

> The United States Supreme Court has set forth a three-step, process to prove intentional discrimination when direct evidence is not available. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). First, the plaintiff establishes a prima facie case by proving that she is female, she applied for and was qualified for the position for which the employer was seeking applicants, that despite her qualifications she was rejected, and *the employer did not treat sex neutrally in subsequently filling the position.* [Other citations omitted.]

First Circuit App. at 303 (emphasis added). *See also* First Circuit App. at 300, where Kilcoyne, in the very same brief to the District Court, argued that "Dr. Kilcoyne has a clearly established prima facie case in that . . . (4) *sex was not treated neutrally* . . . ." Similarly, in oral argument to the District Court, Kilcoyne's counsel argued *not* that a prima facie case is irrelevant but *instead* that Kilcoyne met her prima facie burden because "in this case *sex was not treated neutrally*. . . ." First Circuit App. at 541 (emphasis added). Thus, Kilcoyne's sudden change of heart concerning the elements of a prima facie case of sex discrimination was enough in itself to underscore the frivolousness of her appeal. "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy*, 950 F.2d at 22-23.

Moreover, the truly exacerbating aspect of Kilcoyne's frivolity is that, despite sanctions below, Kilcoyne now seeks to mislead this Court in exactly the same way — she argues yet again that "[t]he district [court] states the fourth element [of the prima facie case] incorrectly" (*see* Petition at 14) even though at issue is exactly the prima facie case that *she* advocated to the District Court. A reasonable conclusion is that it was exactly this type of disingenuity on the part of Kilcoyne that influenced the First Circuit's *per curiam* affirmation of the District Court's order and its *imposition of double costs* on Kilcoyne's counsel.

Particularly outrageous is Kilcoyne's present argument that the opinion of the Third Circuit in *Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497 (3rd Cir. 1996) establishes a rule contrary to the decision of the First Circuit. *See* Petition at 15-18. There is *nothing* in *Marzano* even remotely on point. There, the defendants terminated plaintiff's employment, allegedly as a result of a reduction in force. 91 F.3d at 499. When the district court analyzed Marzano's pregnancy discrimination claim as having occurred in a force reduction setting and awarded

summary judgment to the defendant employers, the Third Circuit held that "the issue of . . . whether a reduction in force did occur was a question of fact that should have been presented to the jury and which, on summary judgment, should be resolved in favor of the non-moving party, i.e., Ms. Marzano." 91 F.3d at 506. It thus overturned the award of summary judgment for the following reason:

> Because the district court could not conclude as a matter of law that a reduction in force (RIF) did occur, the court could only grant summary judgment for the defendants if it found that Ms. Marzano could not make a prima facie case of discrimination under either applicable legal setting — i.e., reduction in force or no reduction in force.

91 F.3d at 506.

The Third Circuit then stated as follows:

> In the context of a reduction in force, we have held that to demonstrate a prima facie case, "the plaintiff must show he was in the protected class, he was qualified, he was laid off and other unprotected workers were retained."

91 F.3d at 508.

The holding by the Third Circuit in *Marzano* is thus too far afield to conflict with the case at hand. Indeed, it is inapposite. Kilcoyne does not and cannot contend that she lost her job through a reduction in force. Rather, her Petition expressly admits that Kilcoyne left Bentley "[w]hen her contract expired on June 30, 1992." *See* Petition at 6. Thus, Kilcoyne's is not even a termination case. The District Court's award of summary

judgment to the respondents instead involves Kilcoyne's claim of sex discrimination relating to a *new* job for which Bentley chose someone else, notably *another woman*. There is thus no possible conflict with *Marzano*.

Equally absurd is Kilcoyne's comparison of her litigation to *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997). *See* Petition at 18. At issue in *Taxman* was whether the employer unlawfully discriminated because of race "when it made race a factor in selecting which of two equally qualified employees to lay off." 91 F.3d at 1549. Notably, the parties in *Taxman* "[did] not dispute that [the plaintiff had] established a prima facie case of [race] discrimination or that the Board's decision to terminate her was based on its affirmative action policy." 91 F.3d at 1556. The legal question in *Taxman* was thus "whether Title VII permits an employer with a racially balanced work force to grant a non-remedial racial preference to promote 'racial diversity'." 91 F.3d 1547.

The instant case, by contrast, is radically different. Not only, as is discussed above, is the instant case *not* about a termination; in addition, as the District Court found, no prima facie case was established. Further, there was no evidence about, or litigation concerning, Bentley's affirmative action policy. Nor was there evidence or litigation about whether Bentley has a racially or ethnically balanced work force. Nor was there evidence or litigation about whether Bentley was trying to grant a non-remedial preference of some sort. After all, Kilcoyne sued only on the basis of sex discrimination, did not sue on the basis of ethnicity or national origin, did not challenge any aspect of Bentley's affirmative action policy concerning ethnicity or national origin except by implication *after* she had lost a summary judgment motion in the District Court relating to *sex* discrimination, and did not satisfy the prima facie case for sex

discrimination that she herself advocated to the District Court. *Taxman* thus has no rational relationship to the instant case, and it most certainly is not in conflict.[11] Rather, in the instant case, the District Court's Memorandum and Order are well-reasoned and supported by law, there was no basis for overturning that Order on appeal, and there is even less justification now for an exercise of this Court's discretionary jurisdiction. *See* Petition, Appendix C. In particular, Kilcoyne cannot be allowed to invoke Certiorari over the District Court's application of *exactly* the prima facie criteria that she herself advocated prior to the District Court's ruling. *See* Petition at 19 and Appendix C at 11a; First Circuit App. at 300, 303, 541.

III.

THIS COURT'S EXERCISE OF SUPERVISORY POWER OTHERWISE IS NOT REQUIRED.

The Petition also argues without merit that the First Circuit's "[a]ssessment of [double costs] against counsel for Dr. Kilcoyne under either Rule 38 or Rule 39 is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision." Petition at 22. Notably, "costs" in this case are only $76.50. *See* Appellees' Itemized and Verified Bill of Costs. "Double costs" are thus only $153.00. *Id.* Surely an amount so small does not warrant an exercise of this Court's discretionary jurisdiction.

---

11. *Taxman* provides no basis for Kilcoyne's contention that "Dr. Kilcoyne met the modest burden of the prima facie case." *See* Petition at 19. Kilcoyne never showed in any way that Bentley failed to treat sex neutrally. As the District Court concluded, "Kilcoyne has failed to produce any admissible evidence that gender played any role at all in Bentley's hiring decision." Petition, Appendix C at 12a.

Indeed, the Rule is clear that, whenever a judgment is affirmed on appeal, "costs shall be taxed against the appellant unless otherwise ordered." *See* Fed. R. App. P. 39(a). Accordingly, *half* of the "double costs" now at issue would have been awarded to the respondents as a matter of course, even if the First Circuit had not become so aggravated by Kilcoyne's frivolous and vexatious appeal that it imposed sanctions. The "sanctions" portion of the "double costs" is thus a mere $76.50.

Further, to the extent that Kilcoyne possibly can argue that an exercise of this Court's supervisory powers somehow is required because of the First Circuit's well-deserved award of "double costs" against her counsel, *the respondents hereby waive any such claim for "double costs."* Having already paid heavily in this unduly protracted litigation for the sanctionable misconduct of Kilcoyne's counsel, the respondents submit this waiver simply to facilitate further the well-deserved and long-overdue conclusion to the utterly frivolous, vexatious, and expensive claims unreasonably inflicted on them.

CONCLUSION

For all of the above reasons, this Court should deny the Petition and decline to issue a Writ of Certiorari.

Respectfully submitted,

DAVID C. HENDERSON
Counsel of Record
SHARON R. BURGER
NUTTER, McCLENNEN & FISH, LLP
Attorneys for Respondents
One International Place
Boston, Massachusetts 02110
(617) 439-2000